Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-820

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
vs.
JOHN RAMBO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a party seeking a 33 U.S.C. § 922 Modification of an Award of Permanent Partial Disability prove that the Claimant has undergone a change in "physical condition"?

2. Should the Employer's Application For Modification be denied because of the representations of its attorney to the injured worker that the award would be paid for life? (S. Ct. Rule 15.1)

PARTIES TO THE PROCEEDING

Petitioner, Metropolitan Stevedore Company has reported that it has no parent companies and no subsidiaries that are not wholly owned.

Respondent, John Rambo is an individual resident of Los Angeles, California.

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No. 94-820

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
vs.
JOHN RAMBO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

The Respondent, John Rambo, respectfully requests that this Court deny the Petition For Writ of Certiorari submitted by the Petitioner, Metropolitan Stevedore Company, seeking review of the Ninth Circuit's decision in this case.

STATEMENT OF CASE

A. Nature Of The Case

The Respondent, John Rambo, ("Rambo") a longshoreman was injured within the course and scope of his employment on September 9, 1980, while employed

by Petitioner, Metropolitan Stevedore Company ("Metropolitan").

Trial was set in 1983 before his Honorable Administrative Law Judge James J. Butler. Rambo was represented by counsel and the employer was represented by James J. Wood. Among other things, the parties stipulated:

> "That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability." (Appendix B2).

On November 28, 1983, his Honorable Administrative Law Judge, William J. Butler, issued a Decision and Order awarding benefits to Rambo at the rate of $80.16 per week for permanent partial disability.

On October 30, 1989, "Metropolitan" filed with the Department of Labor an "Employer's Application For Modification, Section 922." ("Modification") (Appendix A1-A3).

The Modification contained no medical evidence and did not allege a change in Rambo's physical condition. The Modification relied solely on Rambo's post award earning records. "In this case we [Petitioner] can clearly show simply by the earnings information alone . . ." (Appendix A3).

A Formal Hearing on the modification was convened on October 15, 1990, by his Honorable Administrative Law Judge Daniel Stewart ("ALJ"). At the commencement of the hearing, "Rambo" moved to dismiss the

Application for Modification on the ground that the "Modification" failed to allege nor was it supported by evidence of a change in Rambo's "physical condition." (Appendix C3-C5). The Motion was denied.

Rambo's earning records were admitted into evidence and the only witness called to testify was Rambo.

The ALJ's findings included the following:

1. "[Rambo] testified that his physical condition since 1983 when he was awarded permanent partial disability, has remained about the same. (Appendix C7)

2. "[Rambo] testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working full time as a longshoreman. He is presently working steadily as a crane operator . . ." (Appendix C6).

In addition, Rambo testified that he was told by Mr. James J. Wood at the 1983 trial that if he accepted the sum of $80.16 per week, it would be paid for life.

In Open Court, on the record, Mr. Wood said:

> "Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I guess." (Appendix C8).

Mr. Wood did *not* call himself as a witness to deny Rambo's testimony. The only evidence in the record on this issue is the testimony of Rambo.

The "ALJ" found in favor of Metropolitan, granted the Modification, and terminated Rambo's benefits.

Rambo appealed to the Benefits Review Board.

The Benefits Review Board citing *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) affirmed stating ". . . that a mere change

in a Claimant's wages could satisfy the change in conditions' requirement for modification."

B. The Ninth Circuit's Decision

The Ninth Circuit, in a *PUBLISHED* decision, filed June 24, 1991, reversed the decisions below and ruled that, ". . . a mere change in a Claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather a party seeking to modify an award must prove that the Claimant has undergone a change in his physical condition."

The Court noted that ". . . [Metropolitan] relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in the Claimant's wages could satisfy the 'change in conditions' requirement of 33 U.S.C. § 922."

The Ninth Circuit stated with approval that the *Fleetwood* dissent pointed out that, ". . . beginning with the first opinion dealing with the question, [*McCormick, supra*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term 'change in condition' in (33 U.S.C. § 922) to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added by the Ninth Circuit).

The Ninth Circuit also noted that its holding on the issue in this case is supported by the authority in the First and Fifth Circuits.

Only the Solicitor's Office, on behalf of the Director OWCP, filed a Brief in Opposition to Rambo's appeal to the Ninth Circuit. After the decision of the court in Rambo's favor, the Solicitor filed a Petition For Re-Hearing. On the last page of that Petition the Solicitor

virtually conceded that Metropolitan's Application For Modification should be denied in the interest of ". . . Justice under the Act." The Solicitor noted:

> "6. Rambo has also contended throughout that the circumstances of the parties' agreement to the 1983 award's terms included representations that the award would not be modified (at least not downwards). Modification may be denied, despite an adequate demonstration that one of the statutory conditions for it exists, where changing the award would not "render justice under the Act." *McCord v. Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976). In addition, the circumstances alleged by Rambo could be construed to effect an express waiver of the employer's right to seek modification of the 1983 award under Sec. 22 [*sic*]. Accordingly, Rambo's contention warrants full consideration."

ARGUMENT AND AUTHORITIES

Rambo contends that the threshold burden of proof for a party who seeks section 922 Modification, is a showing that the injured worker's physical condition has changed following the Award. After this prerequisite has been met, it is proper to consider other evidence on the issue of earning capacity.

Rambo admittedly suffered a serious injury that produced a, ". . . permanent partial disability equivalent to 22 1/2% of the whole person."

At the Formal hearing, the employer produced no evidence of a change in Rambo's physical condition. The only evidence produced at trial on the issue of physical condition was the testimony of Rambo. He testified that his physical condition was the same as it was at the time of the Award.

The Ninth Circuit in the case below held that,

> "Under our cases, a mere change in claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added by Ninth Circuit).
>
> For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages — without proof of a change in his physical condition — was not sufficient to satisfy the 'change in conditions' requirement of 33 U.S.C. § 922. *See id.* at 86 (rejecting the petition for modification because it was not based upon 'a *change in physical condition*,'

> but rather upon the claimant's changed earnings. . . ." (emphasis added by Ninth Circuit).

The decision below emphasizes that, ". . . the *PARTY* seeking to modify an award . . ." has the burden of showing a change in the employee's physical condition. It is respectfully submitted that any other interpretation of the expression "change in conditions" would permit modification of awards based upon a mere change in the business cycle, such as in the great depression, or, after a period of rapid inflation, either of which would have a dramatic effect on worker's earnings.

Furthermore, inevitably due to the aging process, it is predictable that the worker's earnings will deteriorate. In *Rizzi v. The Four Boro Contractor Corp.* (1974) 1 BRB 130, the Benefit's Review Board faced this precise situation. The injured worker sought permanent total disability by way of a Section 922 Modification. The Board denied modification and stated:

> "The Term, 'change in condition', means alteration of the physical condition of the employee caused by the accident." Citing *Bay Ridge Operating Co. v. Lowe*, 14 F. Supp. 280 (S.D. N.Y. 1936)

The factual situation in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933) was the same. During the depression the injured worker sought modification and the Ninth Circuit refused relief unless there was a change in the worker's "physical condition."

It is respectfully submitted that in the venue of Longshore Workers' Compensation, sixty years of experience with the "*McCormick* Rule" has served the *PARTIES* well.

Petitioner asks this Court to open the pandora's box of permitting modification of awards on the mere showing of a change in earnings. Petitioner states that, "The Ninth Circuit's Ruling is neither sensible nor consistent with the statutory scheme." It is wondered how sensible Petitioner will think its scheme of things is when injured workers such as *McCormick* and *Rizzi* file "naked" modifications based solely on reduced earnings? Furthermore, the record in the case below does not raise the "retraining" or "reemployment efforts" that petitioner attempts to address to this Court. The Application For Modification filed by Metropolitan was a "naked" petition supported only by Rambo's earnings subsequent to the Award. There is no evidence of the employer's "retraining" or "reemployment efforts" in the record below. Without such a record, it is respectfully submitted that the question Metropolitan seeks the Court to review is NOT ripe for decision.

Finally, as the Ninth Circuit pointed out, Petitioner relies solely on *Fleetwood, supra.* Under the facts of the case at bar, an application of *Fleetwood*, permitting modification merely on a showing of post award earnings encourages:

> 1. The employer to stipulate to an award, wait for the appropriate business cycle and inflation to justify a downward modification; or,
>
> 2. The injured worker to stipulate to an award, wait for the appropriate business cycle and reduced earnings to justify an upward modification.

It is respectfully submitted that this aberration was exactly what *McCormick* sought to avoid and must not be permitted.

CONCLUSION AND PRAYER

1. Sound policy underlies the rule announced by the Ninth Circuit in 1933 and affirmed in the case at bar, that ". . . a party seeking to modify an award must prove that the Claimant has undergone a change in his physical condition. . ." in order to satisfy the "change in conditions" required by 33 U.S.C. § 922.

2. The "Question Presented" by "Metropolitan" in its Petition For Writ of Certiorari is **NOT** the question decided by the Ninth Circuit in the decision below.

3. The most efficient manner for this Honorable Court to affirm the precedent first announced in 1933 and followed in the decision below, is to simply deny this Petition for Writ of Certiorari.

Therefore, Respondent prays that the Court deny Metropolitan's Petition For Writ of Certiorari because this case presents no issue appropriate for the Court's review, and because the lower Court's holding was not in error.

DATED: November 30, 1994.

Respectfully submitted,

THOMAS J. PIERRY
Counsel of Record

PIERRY & MOORHEAD

Attorney for Respondent
JOHN RAMBO

APPENDIX A

EXCERPTS FROM EMPLOYER'S APPLICATION FOR MODIFICATION §922

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Attorney for Employer

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS

JOHN D. RAMBO,
Claimant,
vs.
METROPOLITAN STEVEDORE COMPANY,
PERMISSIBLY SELF-INSURED,
Employer.

CASE NO: 18-6945 (83-LHC-242)

EMPLOYER'S APPLICATION FOR MODIFICATION §922

COMES NOW the employer by this Application to modify the previous Compensation Order of the Department of Labor filed December 6, 1983.

STATISTICAL DATA

Claimant: John D. Rambo
Injury Date: September 9, 1980
Birth Date: April 11, 1945
Social Security No: 547-64-2169
Employer No: C8000144

Pre-Injury Wage: $534.38
Benefit Rate: $356.26
Wage Loss: $124.24 per week
Benefit Rate: $80.16
Special Fund Started: December 1, 1983

STATEMENT OF FACT

This matter came on before an Administrative Law Judge who issued a decision which was converted into a Compensation Order by the Department of Labor filed December 6, 1983. That Compensation Order provided that the claimant, as a result of the injury herein, sustained a weekly wage loss of $120.24 per week providing for a compensation rate of $80.16 per week. The employer paid the first 104 weeks and the claimant has been getting paid by the Special Fund in the interim.

The employee's current earnings are documented by Pacific Maritime Association records, enclosed herein as Exhibit B. Exhibit A represents the calculations for the period covering the week ending March 12, 1988 through the week ending March 4, 1989. This 52 week period demonstrates that the employee earned $78,271.05 for an average weekly wage of $1,505.21. This is almost 300% of the employee's pre-injury average weekly wage demonstrating that he is not entitled to a wage loss of any kind at this time and that he has no economic disability as a result of this injury.

APPLICATION FOR MODIFICATION

The employer respectfully requests that all compensation payments being made through the Special Fund be terminated immediately. There is prima facie evidence presented here to demonstrate that this employee does not have a wage loss

now and he has not had a wage loss for the last year or two.

* * *

In this case we can clearly show simply by the earnings information alone that for the time frame between the issuance of the previous Compensation Order and the present earnings of the claimant there can be no reasonable argument made suggesting that pay increases in the interim would be an adequate explanation for the increase. There is no basis whatever for the pay increases to support a 300% increase in earnings as is demonstrated by the information provided.

WHEREFORE, employer respectfully requests that a Stay Order issue immediately. Thereafter, if the claimant failed to show good cause why a Compensation Order terminating benefits should not issue, then an Order terminating benefits should issue relieving the Special Fund of further liability and relieving the employer of any potential assessments for monies paid by the Special Fund in this case. Lastly, if the Department of Labor either refuses to act upon this Application for Modification or alternatively if it considers itself to be powerless to act for any reason, it is then requested that the matter be referred promptly to the Office of Administrative Law Judges. An LS-18 is enclosed for that purpose.

* * *

Respectfully submitted,

/s/ JAMES J. WOOD
JAMES J. WOOD
Attorney for the Employer

APPENDIX B

EXCERPTS FROM CLAIMANT'S TRIAL BRIEF

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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

JOHN D. RAMBO,
Claimant,
-vs-
METROPOLITAN STEVEDORE COMPANY,
Employer,
SELF-ADMINISTERED.

OWCP NO.: 18-6945
CASE NO.: 83-LHC-242

CLAIMANT'S TRIAL BRIEF

I.

FACTS

Claimant was injured on September 9, 1980 while in the employ of Metropolitan Stevedore Company. The employer voluntarily provided medical and temporary total disability benefits. The claim was set for a Formal Hearing before His Honorable Judge James J. Butler.

At the Formal Hearing:

> "The parties [have] STIPULATED as follows (29 C.F.R. Section 18.51): . . .
> 6. That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability. . . ."

On November 28, 1983 His Honorable Administrative Law Judge William J. Butler issued his Decision and Order. . . .

* * *

II.

Claimant objects to the introduction of any evidence by the employer at this Formal Hearing and respectfully requests an order dismissing these proceedings. Said objection is based upon the following grounds:

* * *

B. Modification of an Award based on a change in condition can only be granted where the claimant's physical condition has improved following the entry of the Award. The employer has offered and has no evidence concerning claimant's physical condition since the entry of the Award in 1983.

III.

ARGUMENT

* * *

B. Since 1933 the 9th Circuit has, . . . "without wavering thereafter . . . uniformily interpreted the term 'change in condition' in Section 22 of the Longshoreman's and Harbor Workers' Compensation Act (LHWCA), 33 USC Section 922 (1982), to refer exclusively to a change in the physical condition of the employee receiving compensation."

> Dissenting opinion — Judge Warriner
> *Fleetwood v. Newport News*, 18 BRBS 12 at page 33 (4th Cir. 1985)
> Citing: *McCormick v. U.S. Employees Compensation Commission*, 64 F 2nd 84 (9th Cir. 1933)

This is still the law of this circuit. It will govern the case at bar until overturned by the 9th Circuit or the Unitd States Supreme Court.

It is respectfully submitted that this Honorable Court is duty bound to apply the law of the 9th Circuit and dismiss this proceeding on the ground that the employer has failed to produce any evidence of change in condition.

* * *

WHEREFORE, claimant respectfully requests that this Court dismiss these proceedings or in the alternative to continue this matter to the calendar of Judge James Butler.

Respectfully submitted,
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McCARTHY & PIERRY
By: _____
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Attorneys for Claimant